United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7634

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

JOAQUIM CONCEICAO,

Plaintiff-Appellant,

—against—

NEW JERSEY EXPORT MARINE CARPENTERS, INC.,

Defendant-Third Party Appellee,

P/S

—and—

CIA DE NAV. MAR NETUMAR,

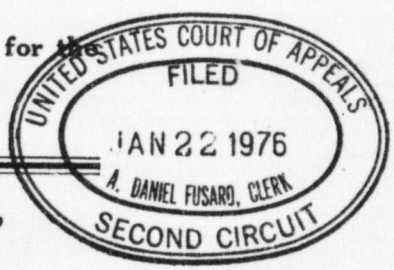
Third Party Defendant-Appellee,

—against—

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,

Third Party Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York



BRIEF FOR PLAINTIFF-APPELLANT, JOAQUIM CONCEICAO

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STATEMENT OF ISSUES FOR REVIEW

Where a third party defendant stevedore in a longshoreman personal injury action was found by the jury to have breached its warranty of workmanlike performance in causing the injuries, but nevertheless held not liable in indemnity, and where the third party defendant vigorously opposed plaintiff-appellant's action, may the third party defendant stevedore claim reimbursement of its Longshoremen and Harbor Workers' Compensation Act expenditures on behalf of plaintiff-appellant, under the equitable doctrine of subrogation?

RELATED PROCEEDINGS

This matter was before the Court previously, Docket No. 74-1344; the affirming opinion is reported at 508 F.2d 437; cert. den. 4/28/75, 95 S. Ct. 1680, (sub nomine Cia de Nav. Mar Netumar vs. Conceicao, et al).

STATEMENT OF THE CASE

The plaintiff-appellant, a longshoreman, sustained an injury to his left foot on November 5, 1970, when it became caught between some pipe which he and other longshoremen in the employ of International Terminal

Operating Co., Inc. (I.T.O.) were loading and stowing in a pipe bed which had been constructed on the weather deck of the vessel SS MOSQUEIRO (owned by Netumar) by marine carpenters in the employ of New Jersey Export Marine Carpenters, Inc. (New Jersey Export).

The plaintiff-appellant sued both New Jersey Export and Ne

Both New Jersey Export and Netumar impleaded I.T.O.

After trial before the District Court and a jury, the case was submitted to the jury on written questions. New Jersey Export was found free of negligence and not to have breached its warranty. Netumar was held to have been negligent but the SS MOSQUEIRO was found to be seaworthy. The plaintiff-appellant was found free of contributory negligence but I.T.O. was found to have breached its warranty of workmanlike service. Netumar however was denied indemnity because the jury found that its conduct precluded indemnity. Damages in the sum of $42,000.00 were awarded the plaintiff-appellant and judgment in accordance with the jury's answers to the questions was entered against Netumar on November 9, 1973.

Netumar subsequently filed a notice of appeal and this Court affirmed the judgment on December 11, 1974, (508 F.2d 437).

Finally, Netumar petitioned the United States Supreme Court seeking a writ of certiorari. The petition for a writ of certiorari was denied on April 28, 1975.

Upon remand, the shipowner defendant, Netumar, made a motion in the District Court to deposit the judgment, interest and costs with the Court. Plaintiff-appellant opposed the motion and cross-moved to declare invalid the claim against the judgment monies being asserted by the third-party defendant, International Terminal Operating Co. Inc. I.T.O. was seeking reimbursement of $6,827.19 for its expenditures in compensation and medical expenses (including interest), made by it under the U.S. Longshoremen's and Harbor Workers' Compensation Act.

The District Court, Honorable Robert J. Ward, in a memorandum opinion October 10, 1975, granted the shipowner's motion and denied plaintiff-appellant's cross-motion. The Court held that the employer, I.T.O., was entitled to reimbursement of its compensation payments

from the plaintiff-appellant's recovery. I.T.O. has been paid the $6,827.19, and the balance of the judgment has been paid to plaintiff-appellant.

Plaintiff-appellant appeals from the denial of his cross-motion for a declaration of the invalidity of the claim of third party defendant, International Terminal Operating Co., Inc.

STATEMENT OF FACTS

Plaintiff-appellant respectfully submits to the Court that it need only consider as factual matters on this appeal the verdict on the trial by the jury finding that I.T.O. had breached its warranty of workmanlike performance, whereas plaintiff-appellant was held free from contributory negligence; and the fact that third party defendant, I.T.O., participated in the trial as an adverse party to the plaintiff-appellant in an effort to defeat plaintiff-appellant's claims, as well as the indemnification claims asserted against it by the shipowner and carpenter. In addition, there was no Formal Award entered in the compensation proceedings before the Bureau of Employee's Compensation.

POINT I

THIRD PARTY DEFENDANT INTERNATIONAL TERMINAL OPERATING CO., INC., IS NOT ENTITLED TO RECOVER ITS EXPENDITURES IN WORKMEN'S COMPENSATION OUT OF PLAINTIFF-APPELLANT'S RECOVERY UNDER THE EQUITABLE DOCTRINE OF SUBROGATION, WHERE ITS CONDUCT HAS NOT BEEN EQUITABLE.

International Terminal Operating Co., Inc. claims that it should be reimbursed out of the Judgment for its expenditures made in connection with plaintiff-appellant's compensation claim under the U.S. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. There is no statutory basis for this claim, since no Formal Award was entered in the compensation case, and the provisions of 33 U.S.C. 933(b) therefore did not come into operation.

Rather, International Operating Co.'s claim arises under the equitable doctrine of subrogation where "... one...pays money on account of a legal obligation resting upon him for the imposition whereof another is held pecuniarily responsible." (The Etna, 138 F. 2d 37, CCA 3d, 1943).

But one who seeks equity must do equity.

Here, International Terminal Operating Co., Inc. has not acted equitably, nor does International Terminal Operating Co., Inc. have "clean hands" because:

1. During the course of trial, it actively opposed, and vigorously attempted to defeat plaintiff-appellant's right to recover.

2. International Terminal Operating Co., Inc. was adjudged by the jury to have been at fault in causing plaintiff-appellant's injury, even though the jury found Netumar's conduct such as would preclude it from recovering indemnity from International Terminal Operating Co., Inc.

Thus, if International Terminal Operating Co., Inc. attempted to recover for its own account against the defendant, Netumar, it would be barred by its own causative fault in bringing about the injuries. But, nevertheless, International Terminal Operating Co., Inc. now seeks the same result by assuming the cloak of plaintiff-appellant's own innocence and absence of fault.

In order to succeed in its claim for equitable reimbursement, International Terminal Operating Co., Inc.'s equity to the funds would have to be of an higher order, or superior to, plaintiff-appellant's equitable interest in the fund. This cannot be the case where International Terminal Operating Co., Inc. has been found responsible for the injuries and plaintiff-appellant was found to be

free from fault. To reimburse International Terminal Operating Co., Inc. under the facts of this case, where the merits have been adjudicated against it, would serve to completely exonerate International Terminal Operating Co., Inc. from any financial responsibility for the injuries it caused. This result would work injustice to the plaintiff-appellant who in no way contributed to the injuries.

Although the U.S. Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901 et seq.) has been amended a number of times, and §933(b) was specifically amended in 1959, none of the amendments change this aspect of the law. The employer's right to recoup is found on the doctrine in equity of subrogation, and has no basis in the compensation statute itself. See, generally, the discussions in 1A Benedict on Admiralty 6-34 through 6-48.

Some of the elements of the doctrine of equitable subrogation may be found in Camden Trust Co. v Cramer, 40 A 3D 601, 136 N.J. Eq. 261. We quote from page 603, Atlantic 2D:

> "Subrogation is a doctrine of purely equitable origin and nature, although it is a right that is now considered as within the cognizance of courts of law in certain circumstances. Since it is an equity, it is subject to the rules governing equities; and it is axiomatic that it will not be enforced where it would

> be inequitable so to do. It will not be allowed to work injustice to others having equal or superior equities. The right of subrogation must be founded upon an equity just and reasonable according to general principles--an equity that will accomplish complete justice between the parties to the controversy. The one asserting the right cannot thereby profit from his own wrong; he must, himself, be without fault..."

To allow International Terminal Operating Co., Inc. to recover its expenditures herein would result in profit to International Terminal Operating Co., Inc. from its own wrongdoing, it having been adjudged by the jury to have contributed to plaintiff-appellant's injuries.

The Court is also respectfully referred to Judge Brown's discussion of the elements of subrogation, which was applied in the admiralty matter, in Compania Anonima Venezolana de Nav. v. A. J. Perez Exp. Co., 303 F. 2d 692 (C.A. 5th, 1962, cert. den. 371 U.S. 942, 83 S.Ct. 321, 9 L. Ed. 2D 276) particularly on page 697.

In The Etna (supra) the right of subrogation was declared to be stated in The Restatement of the Law of Restitution §162 which reads:

> "§162. SUBROGATION.
>
> Where property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be

> unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien-holder."

But compare §140 of the Restatement:

> "§140. CRIMINAL AND OTHER WRONGFUL CONDUCT.
>
> A person may be prevented from obtaining restitution for a benefit because of his criminal or other wrongful conduct in connection with the transaction on which his claim is based."

and §3:

> "§3. TORTIOUS ACQUISITION OF A BENEFIT.
>
> A person is not permitted to profit by his own wrong at the expense of another."

And see Schaeffer v. Sterling 6 A 2D 254, 255, 176 Md. 553:

> "According to Pomeroy, the Courts should enforce strictly the maxim of equity, 'He who comes into equity must come with clean hands.' If a person seeking the aid of a court of equity has himself been guilty of any conduct which violates the fundamental conceptions of equity jurisprudence, this maxim refuses him all recognition and relief in reference to the subject. It says that whenever a person seeking some remedy 'has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.' 1 Pom. Eq. Jur. sec. 397; Restatement of the Law of Restitution, 385."

The lack of equities running to the favor of International Terminal Operating Co., Inc. at the outset by its conduct in causing the injuries is compounded by its conduct during the litigation in opposing plaintiff-appellant's claim.

The quity powers of the Court in dealing with the rights of the injured employee vis a vis the employer/compensation carrier in longshore injuries was demonstrated in Czaplicki vs. The S.S. Hoegh Silver Cloud, 351 U.S. 525, 76 S. Ct. 946, 100 L. Ed. 1387 (1956). (The evil demonstrated in that case was eliminated by amendment to §933 of the U.S. Longshoremen's and Harbor Workers' Compensation Act in 1959, wherein the assignment did not become operative until six months after the entry of a Formal Award). Following that case and in the intervening years until the 1959 amendments, carriers would, in recognition of the conflict between their position as compensation carrier and liability insurers for potential third parties, assign the conflicting interests to separate independent counsel.

The conflict of interest is apparent in this case. International Terminal Operating Co. Inc. is self-insured for workmen's compensation, but is, upon information and belief, insured for its third party defendant

indemnification risk. No separation of counsel or representation was made. There was no assistance whatsoever from International Terminal Operating Co., Inc. to plaintiff-appellant insofar as their possible joint interest in the litigation was concerned. Its entire effort was directed to defeating plaintiff-appellant's claim. The relationship between International Terminal Operating Co. Inc. and plaintiff-appellant as respects International Terminal Operating Co. Inc.'s claim for reimbursement of $6,827.19 approaches that of a fiduciary to a beneficiary, or at the least, a joint venture. It is an elemental fact that a fiduciary/trustee, or even a joint venturer, must do no action or take no steps to impair the joint interests. If he does, he cannot later share in the fruits of that relationship.

International Terminal Operating Co. Inc. argued in the Court below that the Supreme Court decision in Pope and Talbot, Inc. v. Hawn, 346 U.S. 406, 74 S. Ct. 202 (1953) (at pg. 412) held the employer had a statutory right to be reimbursed. That decision is inapposite to the situation in this case where no formal award was entered fixing Conceicao's compensation rights. What had occurred in Pope and Talbot vs. Hawn was that the employee had filed an Election to Sue under the compensation procedures in effect between 1938 and 1959,

and the compensation carrier had nevertheless continued to pay compensation while the plaintiff-appellant employee agreed to reimburse the carrier out of any third party recovery. See Hawn vs. Pope & Talbot, Inc., 100 F. Supp. 338, 339 (D.C., E.D. Pa., 1951).

* * *

Relying on Chouest vs. A. & P. Boat Rentals, Inc., 472 F.2d 1026 (C.A. 5, 1973; cert. den. sub nomine Travelers Ins. Co. v. Chouest, 412 U.S. 949, 43 S.Ct. 3012, 37 L.Ed. 2d 1002), plaintiff-appellant urges as alternative relief that International Terminal Operating Co. Inc., at the very least, be required to share proportionately with plaintiff-appellant the attorneys' fees and expenditures incurred by plaintiff in making the third party recovery.

In the instant case, International Terminal Operating Co., Inc. vigorously contested plaintiff-appellant on the main case, and now seeks to claim reimbursement of its compensation expenditures out of plaintiff-appellant's recovery against the shipowner. This is exactly the position taken and followed by Travelers in the Chouest case.

CONCLUSION

The Court is respectfully urged to reverse the holding of the District Court and declare invalid the claim asserted by International Terminal Operating Co., Inc. for reimbursement of its compensation expenditures, or otherwise rule and direct as the interests of justice and equity may require.

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BRIEF AND APPENDIX FOR PLAINTIFF-Appellant
JOAQUIM CONCEICAO
75-7654

JOAQUIM CONCEICAO,
Plaintiff-Appellant,
vs.
NEW JERSEY EXPORT MARINE CARPENTERS, INC.,
Defendant 3rd Party Appellee
and
CIA DE NAV. PAZ NETUNAR,
3rd Party Defendant-Appellee
vs.
INTERNATIONAL TERMINAL OPERATING CO., INC.,
3rd Party Defendant-Appellee.

AFFIDAVIT OF MAILING

STATE OF NEW YORK,
COUNTY OF NEW YORK, } **ss.:**

Richard Franks

being duly sworn, deposes and says: that he is over twenty-one years of age; that on the 20th day of January 1976 he served the annexed Brief and Appendix for Plaintiff-Appellant by depositing on said 20th day of January, 1976 4 true copies of said Brief and Appendix Plaintiff-Appellant, duly enclosed in a postpaid and sealed wrapper, certified mail, return receipt requested, in an official post office duly maintained and and operated by the Government of the United States at Church Street, Borough of Manhattan, New York City, and addressed to:

Alexander Ash, Schwartz & Cohen, Esqs,
801 Second Avenue, New York, New York 10017.
Cichanowicz & Callan, Esqs
80 Broad Street, New York, New York 10004
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11 Park Place, New York, New York 10007

that being the address within that State designated by them on the previous papers in this action as the place where they then kept an office for the regular transaction of business, between which places there then was and now is regular communication by mail.

Richard Franks

Sworn to before me this 20th
day of January, 1976

Edith G. Zwerling

EDITH G. ZWERLING
NOTARY PUBLIC, State of New York
No. 31-9815800
Qualified in New York County
Commission Expires March 30, 1976